INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

Avery v. *Alabama*, 308 U.S. 444	9
Blumenthal v. *United States*, 332 U.S. 539	6
Turner v. *United States*, 396 U.S. 398	5
Ungar v. *Sarafite*, 376 U.S. 575	9
United States v. *Eastman*, 326 F. Supp. 1038	8
United States v. *Gonzalez*, 442 F. 2d 698, certiorari denied, *sub nom. Ovalle* v. *United States*, 404 U.S. 845	5
United States v. *Lawson*, 334 F. Supp. 612	8
United States v. *Nasse*, 432 F. 2d 1293, certiorari denied, 401 U.S. 938	6
United States v. *Poeta*, 455 F. 2d 117, certiorari denied, May 22, 1972 (No. 71-1146)	7
United States v. *Wolk*, No. 71-1678, C.A. 8, decided August 30, 1972	8

Constitution and statutes:

Constitution of the United States, Sixth Amendment	8

Constitution and statutes—Continued	Page
Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, as amended, 18 U.S.C. 2510 *et seq.*	7
18 U.S.C. 2516(2)	7
18 U.S.C. 2517	7
18 U.S.C. 2518	7
21 U.S.C. (1964 ed.) 174	2, 5
McKinney's Consolidated Laws of New York Annotated, Criminal Procedure Law (1971 ed.):	
Art. 700 (formerly N.Y. Code of Criminal Procedure §§ 813-J-825)	6
§ 700.05(5) (formerly N.Y. Code of Criminal Procedure § 814(5))	7

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-261

JAMES O. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals issued no opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1972. The petition for a writ of certiorari was filed on August 17, 1972, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence that petitioner knew the cocaine in this case was illegally imported.

2. Whether there was sufficient evidence to sustain petitioner's conviction as a conspirator.

3. Whether evidence obtained pursuant to a wiretap order authorized by a state judge was admissible in a federal prosecution.

4. Whether the requirement that petitioner be notified that he was the subject of a wiretap order was properly complied with.

5. Whether the trial court erred in denying petitioner's motion for a continuance.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner and eight others were convicted of having conspired to violate 21 U.S.C. (1964 ed.) 174. Petitioner was sentenced to imprisonment for a term of fifteen years and fined $10,000. The court of appeals affirmed without opinion (Pet. App. Exhibit A).

The evidence at trial showed a large-scale conspiracy to import and distribute cocaine. The scheme involved transporting 21 kilograms of cocaine to New York aboard a Chilean ship (Tr. 374-379, 454).[1] Upon arrival in New York on or about September

[1] "Tr." and "S. Tr." refer, respectively, to the transcript of the trial and post-trial hearing on petitioner's motion to suppress.

6-7, 1970, the cocaine was thrown off the ship by one of the conspirators and retrieved by a skindiver (Tr. 411-414, 426-442). The cocaine was then brought ashore and sold to the Hernandez brothers (Enrique, Martin, and Victor), who in turn sold the cocaine to others, including petitioner (Tr. 455-465). A subsequent shipment of 40 kilograms arrived in New York on November 5-6, 1970.

The government's evidence linking petitioner to the illicit scheme consisted almost exclusively of conversations intercepted through a wiretap on his telephone, which had been authorized by a New York State court.

On September 9, 1970, petitioner was observed leaving his apartment and driving to a location in Manhattan, where he passed a shopping bag to Enrique Hernandez (Tr. 967-969). Later that day the court-authorized wiretap was placed into operation and a call between Enrique and petitioner was intercepted. The conversation concerned a dispute about money petitioner owed Enrique (Tr. 1014-1015; Conv. 1). During a second conversation, intercepted on September 14, Enrique indicated that there were "one or two left" and petitioner asked Enrique "to hold one for [him]."[2] Enrique agreed but insisted

---

[2] Detective Tuckett testified that this expression referred to one or two kilograms of narcotics (Tr. 1055-1056).

Copies of the intercepted conversations of petitioner are being lodged with the Clerk of this Court. At trial the tapes were played and the jury was provided with transcripts of the tapes (Tr. 1049-1051A). "Conv." refers to the conversation intercepted.

that petitioner see him that day (Conv. 2). Later that day petitioner telephoned one Nelson in Boston, who ordered "½ of one" (Conv. 3).

On September 16 petitioner received a telephone call from a person who identified himself as "Joe" and asked if petitioner remembered "the matter we spoke of," and if petitioner could "take care of it" (Conv. 4). After indicating to Joe that he would call and find out, petitioner dialed Enrique's number and spoke to Enrique's wife, who did not know where her husband was or whether there was "anything there" (Conv. 4-7). Petitioner then called Enrique's brother, Victor, but was again unsuccessful in locating Enrique (Conv. 8). Petitioner called Joe back and offered to give Joe "some of what I got" if petitioner was unable to reach Enrique (Conv. 9).

ARGUMENT

1. Petitioner contends that the government failed to prove he knew the cocaine was illegally imported since there was no proof that he had possessed any of the cocaine. Although there was no direct evidence regarding petitioner's knowledge of illegal importation, there was more than enough circumstantial evidence to permit the jury to infer that petitioner knew the cocaine had been illegally imported into this country.

The contents of the intercepted conversation of September 9 concerning a dispute over money indicated that petitioner, who had been observed that day giving Enrique a bag, had paid Enrique $3,000. Since

the cost of a kilogram of the imported cocaine was $11,000 (Tr. 465), the jury could properly infer that petitioner had purchased at least half a pound of cocaine. Further evidence of petitioner's dealing in large quantities of the imported cocaine is found in his conversation with Enrique on September 14 when a purchase of one kilo was arranged, half of which was then sold by petitioner to a customer in Boston. Finally, in a conversation of October 13, 1970, intercepted pursuant to a court-authorized wiretap on Enrique's telephone, petitioner called Enrique and asked him to "save me a couple," an apparent reference to two kilograms of cocaine (Conv. 10). Given the large amount of cocaine petitioner purchased and agreed to purchase, the jury could properly infer that petitioner knew the drugs that if illegally imported had been. See *United States* v. *Gonzalez*, 442 F. 2d 698, 707, 710 (C.A. 2) (en banc), certiorari denied *sub nom. Ovalle* v. *United States*, 404 U.S. 845; cf. *Turner* v. *United States*, 396 U.S. 398, 416-417.[3]

2. Relying on the fact that neither of the two co-conspirators who testified for the government (Sepulveda and Valverde) identified him as a conspirator, petitioner contends that there was insufficient evidence to sustain his conviction. It is not neces-

[3] The trial judge did not instruct as to the presumption of knowledge of illegal importation flowing from possession of narcotics under 21 U.S.C. (1964 ed.) 174, but rather instructed the jury, without objection, that the government had to "prove that the drugs were imported to the knowledge of each defendant * * *" (Tr. 1573). In so doing the trial court permitted the jury to draw the natural inferences from the evidence.

sary, however, that a conspirator know every other member of the conspiracy or all of the details of the conspiracy. *Blumenthal* v. *United States*, 332 U.S. 539, 556-557; see also *United States* v. *Nasse*, 432 F. 2d 1293, 1297-1298 (C.A. 7), certiorari denied, 401 U.S. 938. The evidence here showed that after being brought ashore the cocaine was sold to the Hernandez brothers on September 7, with final payment made to Sepulveda, the supplier, by September 14 (Tr. 454-465, 854-855). The wiretap interceptions showed that it was during this time period that petitioner negotiated and made purchases of cocaine from Enrique, one of the conspirators. That the cocaine in question was part of the September 6-7 shipment is supported by the fact that petitioner purchased some cocaine shortly after it arrived in New York aboard the Chilean ship. Furthermore, during the conversation of September 14, in which Enrique agreed to sell petitioner a kilo of cocaine, Enrique demanded to see petitioner that day, apparently in an effort to sell the cocaine quickly so that Sepulveda could be paid that day. Petitioner's request for more cocaine in his conversation with Enrique on October 13, 1970, also showed that petitioner was a continuing link in the conspiracy to import and distribute cocaine.

3. The wiretap warrant in this case was sought and issued under the provisions of the New York Code of Criminal Procedure §§ 813-J-825 (now McKinney's Consolidated Laws of New York Annotated, Criminal Procedure Law, Art. 700 (1971 ed.)). Pe-

titioner contends that a writ of certiorari should issue to determine whether the state statute conforms to the requirements of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, as amended, 18 U.S.C. 2510 *et seq.* But the state statute follows the federal statute almost verbatim and the application and order in this case satisfied the requirements of both statutes. See *United States* v. *Poeta*, 455 F. 2d 117, 119 n. 5 (C.A. 2), certiorari denied, No. 71-1146, May 22, 1972.

Section 2516(2) of 18 U.S.C. requires that state court warrants comply with 18 U.S.C. 2518 before evidence obtained by state officials can be used by federal officials to prosecute for a federal offense. See 18 U.S.C. 2517. The trial judge found here that there was sufficient "hard evidence in the affidavit to have permitted the Judge in the State Court to grant the [wiretap] order" (Tr. 75). This finding is not challenged here.

Additionally, we note that since the investigation in this case was commenced by state officials it was proper, contrary to petitioner's claim, for the District Attorney of the County of New York to sign the wiretap application. See 18 U.S.C. 2516(2); N.Y. Code of Crim. Proc. § 814(5) (N.Y. Crim. Proc. Law § 700.05(5) (1971)).

4. Petitioner also contends that he did not receive timely notice that his telephone had been tapped. After an extensive post-trial evidentiary hearing, Judge Weinstein found that prior to the expiration of an order extending the time in which to give

petitioner notice, an assistant district attorney personally informed petitioner's counsel, Mr. Leopold, that petitioner's phone had been tapped. The trial judge also found that two of the detectives on the case had made three timely attempts to serve petitioner and that a copy of the notice was mailed to petitioner (S. Tr. 122-124). Judge Weinstein concluded that petitioner was not prejudiced and that the "mailing and the prior attempts to serve [him] constituted full compliance with the statute" (S. Tr. 124). This ruling was correct. *United States* v. *Lawson*, 334 F. Supp. 612, 616-617 (E.D. Pa.); see also *United States* v. *Wolk*, C.A. 8, No. 71-1678, decided August 30, 1972.[4]

5. At a pre-trial hearing on October 7, 1971, Judge Weinstein fixed the date of trial for December 2, 1971, and told all defense counsel to advise their clients immediately of any scheduling conflicts so that substitute counsel could be obtained. On November 26, 1971, petitioner's counsel, Mr. Leopold, wrote the trial judge and requested a continuance of the trial in this case on the ground that he was engaged in a state trial that had commenced on November 8 and was expected to continue through December. Judge Weinstein denied the request, noting that all counsel had previously been advised that the trial date of December 2, 1971, was firm (Pet. App.

---

[4] The situation here is thus quite different from that in *United States* v. *Eastman*, 326 F. Supp. 1038, 1039 (M.D. Pa.), relied upon by petitioner, where the issuing judge "intentionally eliminated the service of the inventory and notice."

Exhibit B). Petitioner contends that the trial court's denial of the motion for continuance abridged his Sixth Amendment rights by compelling the choice of incarceration or proceeding to trial with a new counsel on twenty-four hours' notice.

However, in view of the facts that counsel had been admonished to report scheduling problems promptly, that this case involved multiple defendants, and that a definite trial date had been set almost two months previously, Judge Weinstein did not abuse his discretion in denying the request for a continuance. See *Ungar* v. *Sarafite*, 376 U.S. 575, 589; *Avery* v. *Alabama*, 308 U.S. 444, 446. Furthermore, petitioner has made no showing of prejudice as a result of the trial judge's ruling here. Following the denial of the continuance, Mr. Leopold secured his partner, Mr. Poverstein, to represent petitioner at trial. Mr. Poverstein never claimed that he had insufficient time to prepare for trial, petitioner does not contend that he was denied effective assistance of counsel, and the record does not reveal ineffective representation. Although this case involved a lengthy trial, the evidence regarding petitioner's participation in the conspiracy was limited, and petitioner's trial counsel had the benefit of the pretrial discovery obtained by his partner.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

ROGER A. PAULEY,
RICHARD A. LEVIE,
Attorneys.

SEPTEMBER 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 478204 151